

OFFICE MEMORANDUM

TO: Board of Environmental Review

FROM: David Rusoff, DEQ Deputy Chief Legal Counsel

SUBJECT: HB 521 and HB 311 review for proposed repeal of ARM Title 17, Chapter 8, Subchapter 7, "Permit, Construction and Operation of Air Contaminant Sources," adoption of New Rules I through XVIII, and amendment of rules containing references to the existing Subchapter 7 rules

DATE: October 7, 2002

HB 521 REVIEW

(Comparing Stringency of State and Local Rules
to Any Comparable Federal Regulations or Guidelines)

This proposed rulemaking is a re-initiation of rulemaking first proposed on February 14, 2002, and this memo is an updated version of a memo I drafted on March 26, 2002, prior to the first public hearing in this matter.

Sections 75-2-111 and 207, MCA, codify the air quality provisions of House Bill 521, from the 1995 legislative session, by requiring the Board of Environmental Review to make certain written findings after a public hearing and public comment, prior to adopting a rule to implement the Clean Air Act of Montana that is more stringent than a comparable federal regulation or guideline. By its express terms, HB 521 applies only when there is a comparable federal regulation or guideline.

The Board is proposing to replace the existing air quality preconstruction permit rules with new rules. The rulemaking is not intended to make the rules more stringent but is intended to clarify the rules by rewriting some provisions and by reorganizing the rules.

The language of Section 75-2-207, MCA, implies that it was intended to apply to air quality standards, such as ambient air quality standards and emission limits, and was not intended to apply to procedural rules. The language requiring a finding that the proposed "state standard or requirement" protects public health or the environment and can mitigate harm to the public health or the environment and is achievable under current technology, and the language requiring reference to peer-reviewed scientific studies,

does not seem applicable to procedural rules.

Most of the rules that would be affected are procedural. However, New Rule VIII, "Emission Control Requirements," would impose the same substantive requirements that are now contained in ARM 17.8.715, including the requirement that new sources use best available control technology (BACT) or meet the lowest achievable emission rate (LAER), whichever is applicable.

The current rulemaking proposal varies from the February 14, 2002, proposal only in that it includes two additional proposed new rule provisions and amendment of internal references to the preconstruction permit rules. The two additional new rule provisions include: a purpose section (New Rule I); and a provision allowing a permit applicant to commence certain limited construction prior to issuance of a permit (New Rule III(2) through (5)). The proposed rule amendments merely would amend internal references by substituting the proposed new rule numbers for the existing rule numbers.

None of the additional proposed new rule provisions, the additional proposed amendments, or the original proposed new rules would make the State's rules more stringent than comparable federal regulations or guidelines because there are no federal regulations comparable to the State's minor source preconstruction permit rules. 40 CFR 51.160(b) requires that state implementation plans include procedures to prevent construction that will result in a violation of a control strategy or that will interfere with attainment or maintenance of a national ambient air quality standard. However, there are no general minor source air quality permit programs under federal law. So, there are no federal regulations or guidelines comparable to Montana's air quality preconstruction permitting program, which applies to major sources as well as certain sources below the major source emission threshold.

Therefore, no further HB 521 analysis is required.

HB 311 REVIEW (Assessing Impact On Private Property)

Sections 2-10-101 through 105, MCA, codify House Bill 311, the Private Property Assessment Act, from the 1995 legislative session, by requiring that, prior to taking an action that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact assessment. Under Section 2-10-

103(1), MCA, "action with taking or damaging implications" means:

a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications.

The present proposed action involves rules affecting use of private real property, and the Board has discretion legally not to take the action. So, HB 311 applies to this proceeding.

As discussed above, the proposed new rules and proposed amendments would not be more stringent than the existing Montana air quality preconstruction permit rules, i.e., the new rules would not increase regulation of private property beyond the level of regulation under the current State rules. However, the new rules would regulate private property and would continue to require permits for certain sources of air pollutants for which permits are not required under federal regulations, which require permits only for construction or modification of major stationary sources (generally, sources having the potential to emit 250 tons per year or more of a regulated pollutant).

I've completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. The proposed rulemaking would not:

- * result in either a permanent or indefinite physical occupation of private property;
- * deprive any owner of all economically viable uses of private property;
- * deny a fundamental attribute of private property ownership;
- * require a private property owner to dedicate a portion of property or grant an easement;
- * have a severe impact on the value of private property; or
- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based upon completion of the attached Attorney General's Checklist, the proposed rulemaking does not have taking or damaging implications and no further HB 311 assessment is required.

Enc.

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